No. 98-188

In the Supreme Court of the United States

OCTOBER TERM, 1997

ALEXIS M. HERMAN, SECRETARY OF LABOR,
PETITIONER

v.

L. R. WILLSON AND SONS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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Respondent concedes the existence of a circuit conflict over whether "unpreventable employee misconduct" is an affirmative defense or, instead, "part of the Secretary's case-in-chief" (Br. in Opp. 4), and it acknowledges that the petition properly presents that issue (see *id.* at i, 3, 6). Respondent contends, however, that the first and third questions stated in the petition are not properly presented (*ibid.*), and that the Court should not review the "unpreventable employee misconduct" question, because resolution of that question was "not essential" to the decision below and "does not raise or create substantial questions of federal safety

and health policy." *Id.* at 4, 6. Those grounds for opposing review are unpersuasive.

1. In its petition for review to the court of appeals (and in its subsequent reply brief), respondent presented and addressed separate questions corresponding to the first two questions presented in the Secretary's petition: "Whether the [Occupational Safety and Health Review] Commission erred in finding that [respondent] had actual or constructive knowledge of the alleged violation" and "Whether [respondent] established the affirmative defense of unpreventable employee misconduct." Resp. C.A. Br. 2; see *id.* at 26-33; Resp. C.A. Reply Br. 5-6.[1] The court of appeals treated those questions together, interpreting its prior holding in *Ocean Electric Corp.* v. *Secretary of Labor*, 594 F.2d 396, 401 (4th Cir. 1979), that the Secretary "bore the burden of proving that [a] supervisory employee's acts were not unforeseeable or unpreventable" to compel the conclusion that in this case "unpreventable employee misconduct * * * must be disproved by the Secretary in [her] case-in-chief." Pet. App. 10a-12a. As the petition explains (see Pet. 12-15), the court erred both in failing to distinguish between the separate questions that respondent raised and in resolving each of them against the Secretary. There is, however, no question that the court effectively ruled on both questions—and also, implicitly, on the third question stated in the petition.[2] Fairly read, the court's decision

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[1] For the Court's convenience, we have lodged copies of these briefs with the Clerk of the Court.

[2] Indeed, as discussed below, for other purposes respondent argues that the court held *only* that the Secretary must bear the burden of proving employer "knowledge" in her prima facie case. See Br. in Opp. 2, 4-5 & n.2.

requires the Secretary to establish employer "knowledge" and to disprove the existence of unforeseeable employee misconduct in any context in which those issues may arise. Questions on which the court of appeals has passed in arriving at its judgment are properly presented for review by this Court. See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

As respondent points out (Br. in Opp. 2-3, 6), in litigating this case below the Secretary did not, until her petition seeking en banc review in the court of appeals, specifically challenge applicable precedent requiring her to prove employer "knowledge" of a charged violation as part of her case-in-chief. See, *e.g.*, Gov't C.A. Br. 28 (acknowledging that "Commission precedent requires" Secretary to prove employer knowledge); *id.* at 31-32, 35 n.12 (acknowledging "this Circuit's holding" in *Ocean Electric*, but seeking to distinguish that case); compare Gov't Pet. for Reh'g En Banc (Gov't Reh'g Pet.) 10, 13-14 & n.8. From the outset, however, the Secretary's essential claim has been that respondent is liable, under the Act, for specified acts by its employees (including a supervisor) in violation of an applicable safety standard, because respondent cannot demonstrate that those acts constituted unforeseeable or unpreventable employee misconduct within the meaning of the limited affirmative defense recognized by the Secretary. If the first and third questions presented in the petition are "new," they are merely new arguments in support of that consistent claim; and they have been clearly raised at the outset in seeking review by this Court, which is not bound by any contrary Commission or circuit prece-

dent. See *Lebron*, 513 U.S. at 379; *Williams*, 504 U.S. at 44; see also Gov't Reh'g Pet. 10, 13-14.[3]

More fundamentally, however, while the court of appeals erred in failing to distinguish clearly between the question of employer "knowledge" as part of the Secretary's prima facie case and the question of which party bears the burden on the unpreventable misconduct defense, it did not err in considering those questions together. It would be difficult to analyze comprehen-

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[3] Section 11(a) of the Act, 29 U.S.C. 660(a), provides that "[n]o objection that has not been urged before the Commission shall be considered by the court [on judicial review], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." All three questions presented in the certiorari petition were necessarily resolved by the ALJ (acting for the Commission) when she required the Secretary to prove employer "knowledge," placed the burden of showing "unpreventable employee misconduct" on respondent, and ultimately found the existence of a "serious" violation. See Pet. App. 52a, 58a, 65a. Before the ALJ and the Commission both parties agreed that the employer bore the burden of proving "the affirmative defense of unpreventable employee misconduct." See, *e.g.*, Resp. Pet. for Discretionary Review 8. The Secretary did not challenge before the ALJ the requirement that she prove employer "knowledge" in her case-in-chief: Commission precedent on the point was clear, and the involvement of a supervisory employee in the present violation was sufficient to satisfy the Commission's "knowledge" requirement. Pet. App. 55a-58a. The Secretary had neither reason nor opportunity to raise that issue before the Commission, because the ALJ affirmed the Secretary's citation and the Commission denied Respondent's request for discretionary review of the knowledge and misconduct issues. Compare Resp. Pet. for Discretionary Review 3 (requesting review on three issues) with Pet. App. 41a-42a (directing review of evidentiary issue only). Under these circumstances, Section 11(a) does not bar judicial review of the questions presented by the petition. Compare Pet. App. 12a (holding respondent's challenge to amount of fine foreclosed by Section 11(a)).

sively whether "unpreventable employee misconduct" is an affirmative defense, as to which an employer must bear the burden of proof, without first inquiring what the Secretary must show, under the Act, in order to establish a prima facie case of liability on the part of the employer for the acts of its employees; and one cannot fairly determine what role employer "knowledge" plays in the Secretary's prima facie case without taking account of the Act's express reference to employer "knowledge" in distinguishing between "serious" and non-serious violations (see 29 U.S.C. 666(k)). See Pet. 9-12. Thus, although our certiorari petition attempts to present the relevant issues to the Court as clearly as possible by setting out three separate questions, in our view all three of those questions would also be fairly included within the single alternative question framed by respondent (Br. in Opp. i). In either case, all of the issues raised by the petition are properly presented, and the Court should consider and resolve them together.

2. Respondent concedes that the petition's second (and central) question, concerning who bears the burden of persuasion on the issue of "unpreventable employee misconduct," is properly presented. See Br. in Opp. i, 3, 6 (arguing that first and third questions are not properly presented). It further acknowledges that "there is disagreement between some circuits on this issue." *Id.* at 4; see also Pet. 15-18; Pet. App. 11a & nn. 29-30. Respondent argues, however, that the question does not merit review in this case because the decision below "expressly did not turn on that question." Br. in Opp. 5. That is not a plausible reading of the court of appeals' opinion. See Pet. App. 10a-12a.

Respondent contends that the court first relied on its decision in *Ocean Electric* to hold, dispositively, "that

the Commission improperly had shifted the burden of proving employer knowledge to the Respondent" in the context of the Secretary's case-in-chief. Br. in Opp. 2. From that premise, respondent reasons that the discussion of unpreventable misconduct in the court's opinion "was not essential to the result" reached by the court. *Id.* at 4. The court's discussion cannot, however, be so neatly subdivided. To the contrary, as the petition points out (at 14), the opinion simply conflates the employer "knowledge" and "unpreventable employee misconduct" questions.

As noted above, respondent's own petition for review in the court of appeals separately identified and addressed both issues. Resp. C.A. Br. 2, 26-33. Moreover, although respondent's opening brief cited *Ocean Electric* only in arguing that respondent lacked "knowledge" of the alleged violation in this case (see *id.* at 13, 27), its reply brief argued, contrary to the position advanced by the Secretary (Gov't C.A. Br. 34-35 & n.12), that in *Ocean Electric* the court had already "ruled definitively that the Secretary bears the ultimate burden of persuasion on the defense of unpreventable employee misconduct" (Resp. C.A. Reply Br. 5). The court of appeals resolved that controversy between the parties, and made clear its position on an issue that has divided the circuits, by "reaffirm[ing]" *Ocean Electric*'s allocation of the initial burden of persuasion *and* by expressly applying the same rule to the issue of "unpreventable employee misconduct." Pet. App. 11a-12a & nn. 29-30 (citing *Ocean Electric* in describing circuit conflict). Thus, contrary to respondent's suggestion, the court's holding that "unpreventable employee misconduct * * * must be disproved by the Secretary in [her] case-in-chief" was plainly integral to its disposition of this case.

3. Finally, respondent argues (Br. in Opp. 6) that the question whether an employer must prove "unpreventable employee misconduct" to escape statutory liability for the violation of a workplace health or safety standard, or whether instead the Secretary must *dis*prove such misconduct in order to *impose* liability, "does not raise or create substantial questions of federal safety and health policy." That is incorrect. As the petition explains (at 13-14), the specific elements of the showing that the Secretary recognizes as an appropriate basis for an employer to avoid liability for prima facie safety violations inherently reflect policy-based judgments concerning the appropriate interpretation and enforcement of the Act.[4] Compare *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275, 2292-2293 (1998) (explaining reasons for recognizing, and defining the elements of, affirmative defense to employer liability in sexual harassment cases); *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401-403 (1983). Incorrect assignment of the burden of persuasion on that defense is out of keeping not only with the language and purposes of the Act, but with the appropriate role of the Secretary in determining how the Act should be administered. Moreover, as we have explained, resolution of the misconduct question is analytically closely linked to resolution of the threshold question whether the Secretary bears the burden of demonstrating employer "knowledge" of a violation as part of her prima facie

[4] To establish the "unpreventable misconduct" defense, an employer must generally show (1) that it has established work rules designed to prevent the charged violation; (2) that those rules have been adequately communicated to its employees; and (3) that it has taken steps to discover violations, and has effectively enforced its rules when violations were discovered. See Pet. 10.

case—an issue respondent concedes (Br. in Opp. 5) is central to enforcement policy under the Act.

As the petition points out (at 18), the questions presented in this case arise, in one form or another, in virtually every enforcement proceeding under the Act. This Court's review is necessary in order to resolve these questions and to bring order to the lower courts' "confusing patchwork of conflicting approaches" to these issues. *L.E. Myers Co.* v. *Secretary of Labor*, 484 U.S. 989, 990 (1987) (White & O'Connor, JJ., dissenting from the denial of certiorari).

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For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1998